Asean Securities Paper Mills Sdn Bhd v CGU Insurance Bhd

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02–17 OF 2006(A)
RICHARD MALANJUM CJ (SABAH & SARAWAK), NIK HASHIM AND HASHIM YUSOFF FCJJ
2 FEBRUARY 2007

Civil Procedure — Appeal — Interference by appellate court — Conflicting testimony — Trial judge impeached evidence of respondent's witnesses, whether appellate court should do the same

Civil Procedure — Fraud — Standard of proof in civil action — Whether circumstantial evidence of fraud satisfied both standards of beyond reasonable doubt and balance of probabilities — Whether suspicion of fraud was sufficient to prove fraud

Evidence — Conflicting testimony — Findings of fact of trial judge — Trial judge impeached evidence of respondent's witnesses — Whether appellate court should do the same

Evidence — Expert evidence — Principles applicable — Whether correct for appellate court to completely disregard scientific evidence by experts in favour of circumstantial evidence

Insurance — Fire insurance — Claim on policy — Allegation of arson — Whether alleged arsonist could be acting on behalf of insured — Absence of authority to act — Whether insured barred from claiming sum insured

Insurance — Fire insurance — Fraudulent claim — Allegation of arson — Spontaneous combustion of security papers — Whether presumption against crime operates in favour of insured — Whether arson proved

The appellant ('ASPM') was a joint venture project approved by the Asean Economic Ministers and included shareholders from Asean and non-Asean member countries. ASPM at all material times was involved in the purchase and sale of various categories of papers including security paper. Pursuant to its business activities, it stored its goods at the material time at a warehouse in Kg Acheh, Sitiawan. The appellant had a fire insurance cover from the respondent, who were co-insurers, for a sum of RM32.431m in respect of the goods stored at its warehouse. On 11 September 1989, a fire occurred at the warehouse in Kg Acheh, Sitiawan resulting in the loss of all the

stocks of a variety of papers stored in the warehouse. The appellant made a claim against the respondent for a sum of RM16,124,500 pursuant to the policy. The respondent refused to pay on the ground that the claim was fraudulent under condition 13 of the policy. On the respondent's refusal to pay, the appellant commenced a suit against them. The respondent's defence was that the claim was fraudulent on the ground that the fire was a result of deliberate acts of arson instigated by Balasingham, a shareholder/director of the appellant. After trial at which viva voce evidence was taken, the High Court found for the appellant. The Court of Appeal however disagreed with the High Court, reversed the judgment of the latter and dismissed the appellant's suit with costs (see [2006] 3 MLJ 1). The appellant's case was that the fire occurred due to 'spontaneous combustion', natural, or other causes, but not deliberate.

On 18 April 2006, this court granted leave to appeal on the following questions: (1) whether it is opened to an appellate court to totally disregard the evidence and findings of two experts one of whom was a Senior Government Chemist and Director of the Chemistry Department, Perak, Amar Singh (PW9) and the other a respected retired Professor of Chemistry at the University Malaya, Professor Dato' (Dr) Chan Kai Cheong (PW11) who both conducted investigations and tests of the site on the issue of arson, which issue is the most crucial in these proceedings and that significantly their evidence and findings had cast serious doubts that the fire was a result of arson and that it could have been caused by 'spontaneous combustion' and whether it is competent for the Court of Appeal to rely more on the so called circumstantial evidence as opposed to the direct and scientific evidence in reversing a decision of a trial court; and (2) whether it is competent for the Court of Appeal to hold that the acts of a single shareholder/director binds the company when the shareholder/director was not acting in the course of his employment.

Held, allowing the appeal with costs:

(1) The Court of Appeal had totally disregarded the evidence of the experts, namely PW9 and PW11 which focused on scientific evidence as to the causes of the fire that had occurred. Scientific evidence is undoubtedly important to establish whether the appellant had deliberately committed arson or not. Similarly, the experts' opinion is essential to explain and understand whether a particular type of paper could have triggered spontaneous combustion or not. Despite having such detailed evidence from as many as seven experts representing both the appellant and the respondent of whom PW9, PW11, DW20, DW25 and DW34 testified to the effect that 'spontaneous combustion' could not be ruled out, yet the Court of Appeal had ignored and disregarded the most material expert evidence available on record. Non-consideration of material evidence constitutes 'insufficient judicial appreciation of relevant evidence' (see para 13).

(2) The respondent charged that arson on instigation by Balasingham was the cause of the fire and thus it was incumbent for the respondent to prove circumstances which excluded any other explanation. In this case, however, the respondent had failed to do so. It must be noted that even the respondent's own witnesses (DW20, DW25 and DW34) admitted that 'spontaneous

combustion' could not be ruled out. So, where the evidence leaves it open whether the loss was caused by accidental fire (spontaneous combustion) or arson, the appellant being the assured must recover since the presumption against crime operates in its favour (see para 14).

(3) The standard of proof required where there is an allegation of fraud in a civil proceedings must be one of beyond reasonable doubt and not on balance of probabilities; *Yong Tim v Hoo Kok Chong & Anor* [2005] 3 CLJ 229 followed. Thus, it was rather perplexed on the part of Court of Appeal to come to a finding that the available circumstantial evidence satisfied both the standards, like balance of probabilities and beyond reasonable doubt. Indeed, the stance taken by the Court of Appeal was surprising, not only reflected a departure from the Federal Court's latest binding precedent but perhaps also a lack of appreciation as to the required standard of proof in a civil proceedings focusing on criminal conduct (see para 16).

(4) Quite clearly, PW8's and DW11's evidence contrast with the evidence of DW10 and DW37 with regards to the time of the fire. Faced with these two serious contradictions and with two possibilities, the learned judges of the Court of Appeal ought to have rejected the evidence of DW10 and DW37 as the learned trial judge had done, bearing in mind that both these witnesses had admitted that they had lied and were prone to telling lies and that their evidence contained admission of lies, each having made four to five different statements on different occasions. Devoid of DW10's and DW37's evidence, there was no evidence whatsoever to substantiate arson as alleged by the respondent. In such a case as this, the Court of Appeal must defer to the views of the learned trial judge who had seen and heard the witnesses. DW10 and DW37 were held to be unreliable witnesses and their evidence had been impeached by the trial court. Therefore, it was not right for the Court of Appeal to hold based on their evidence that arson was proved beyond a reasonable doubt (see para 18).

(5) The respondent had not adduced any reliable and cogent evidence which clearly indicated the scope, ambit and the extent of the authority conferred on Balasingham. In the absence of such evidence, the wrongful acts of Balasingham could not be taken into consideration for attributing legal liability to the appellant, especially so in a criminal offence. It was unthinkable to suggest that the shareholders of ASPM from the various Asean countries, India and England had connived with Balasingham to burn the warehouse. Thus, in the absence of authority to act, this court failed to see how the Court of Appeal could come to the conclusion that Balasingham was at all material times acting on the appellant's behalf. Therefore, Balasingham could not be acting on the appellant's behalf within condition 13 of the policy. It followed therefore that in the absence of evidence of absolute management and control of the appellant by Balasingham (and there was none of such evidence in this case), the acts of Balasingham could not become the acts of the appellant. Consequently, the appellant could not be barred from claiming the sum insured (see para 20–21 & 25).

(6) This court agreed with the finding of the learned trial judge that the respondent had failed to prove fraud against the appellant beyond reasonable

doubt. At most the respondent succeeded in creating a suspicion in the cause of the fire by arson. Suspicion, however great, is insufficient to prove fraud which needs to be proved beyond any reasonable doubt. In this case, the respondent, being the insurer, had not discharged the onus of proof of the charged fraud and the appellant, being the assured, therefore must succeed (see para 27).

[Bahasa Malaysia summary

Perayu ('ASPM') adalah projek usaha sama yang diluluskan oleh Kementerian Ekonomi Asean dan termasuk pemegang saham daripada ahli negara Asean dan bukan Asean. ASPM pada masa yang material telah terlibat dengan jual beli pelbagai kategori kertas termasuk kertas keselamatan. Menurut aktiviti perniagaannya, ia menyimpan barang-baranganya pada masa yang material di sebuah gudang di Kg Acheh, Setiawan. Perayu memiliki perlindungan insuran kebakaran daripada responden yang mana adalah syarikat insuran untuk jumlah RM32.431 juta terhadap barangan yang disimpan di gudangnya. Pada 11 September 1989 satu kebakaran telah berlaku di gudang di Kg Acheh Setiawan menyebabkan kerugian kesemua stok pelbagai kertas yang disimpan di dalam gudang. Perayu membuat tuntutan terhadap responden untuk satu jumlah RM16,124,500 menurut polisi. Responden enggan membayar atas alasan bahawa tuntutan adalah palsu di bawah syarat 13 polisi tersebut. Di atas keengganan responden untuk membayar, perayu memulakan tindakan terhadap mereka. Pembelaan responden adalah tuntutan adalah palsu atas alasan bahawa kebakaran adalah disebabkan oleh kebakaran yang disengajakan yang dimulakan oleh Balasingham, seoranf pemegang saham/pengarah kepada perayu. Walau bagaimanapun, Mahkamah Rayuan tidak bersetuju dengan Mahkamah Tinggi, mengakaskan keputusan tersebut dan kemudiannya menolak tindakan perayu dengan kos (lihat [2006] 3 MLJ 1). Kes perayu adalah kebakaran yang berlaku disebabkan oleh 'pembakaran sepontan', bersifat semula jadi atau sebab lain tetapi tidak disengajakan.

Pada 18 April 2006, mahkamah ini memberikan kebenaran untuk merayu di atas soalan-soalan berikut: (1) sama ada terbuka kepada mahkamah rayuan untuk tidak mengendahkan sepenuhnya keterangan dan dapatan daripada dua pakar, seorang daripadanya adalah Ahli Kimia Senior Kerajaan dan Pengarah Jabatan Kimia, Perak, Amar Singh (PW9) dan seorang lagi adalah Profesor Kimia bersara yang dihormati di Universiti Malaya, Profesor Dato' (Dr) Chan Kai Cheong (PW11) yang mana keduanya menjalankan siasatan dan ujian di lapangan atas isu pembakaran sengaja, yang mana adalah isu genting di dalam prosiding ini dan keterangan dan dapatan mereka adalah sungguh bermakna telah menandakan keraguan yang serius bahawa kebakaran adalah disebabkan pembakaran sengaja dan berkemungkinan disebabkan oleh 'pembakaran sepontan' dan sama ada ianya adalah kompeten untuk Mahkamah Rayuan untuk lebih bergantung daripada keterangan berdasarkan keadaan yang bertentangan dengan keterangan terus dan saintifik di dalam mengakas keputusan mahkamah bicara; dan (2) sama ada adakah kompeten untuk Mahkamah Rayuan untuk berpegang bahawa tindakan seorang pemegang saham/pengarah mengikat syarikat apabila pemegang saham/pengarah tidak bertindak dalam keadaan penggajiannya.

Diputuskan, membenarkan rayuan perayu dengan kos:

(1) Mahkamah Rayuan telah tidak mengendahkan keterangan pakar-pakar, iaitu PW9 dan PW11 yang mana menumpukan kepada bukti saintifik terhadap punca-punca kebakaran berlaku. Bukti saintifik tidak dinafikan adalah penting dalam membuktikan sama ada perayu telah secara sengaja melakukan kebakaran secara sengaja atau tidak. Adalah sama, pendapat pakar-pakar adalah penting untuk menerangkan dan memahami sama ada jenis kertas tertentu boleh mencetus kebakaran sepontan atau tidak. Sungguhpun mempunyai bukti yang terperinci daripada tujuh orang pakar yang mewakili kedua-dua pihak perayu dan responden iaitu PW9, PW11, DW20, DW25 dan DW34 yang memberikan keterangan berkenaan dengan kesan bahawa 'kebakaran sepontan' masih tidak dapat diputuskan, Mahkamah Rayuan tidak mengendahkan dan tidak mempedulikan keterangan pakar yang paling penting yang terdapat dalam rekod. Tidak mempertimbangkan bukti penting membuatkan 'kesedaran pertimbangan yang tidak mencukupi terhadap bukti yang releven' (lihat perenggan 13).

(2) Responden mendakwa bahawa kebakaran di atas desakan oleh Balasingham adalah punca kebakaran dan oleh itu ianya adalah kewajipan responden untuk membuktikan keadaan-keadaan yang tidak termasuk mana-mana penerangan. Dalam kes ini, akan tetapi responden gagal melakukannya. Hendaklah diambil perhatian bahawa, walaupun saksi-saksi responden sendiri (DW20, DW25, DW34) mengakui bahawa ' kebakaran spontan' tidak boleh diputuskan. Oleh itu, yang mana keterangan dibiarkan terbuka sama ada kerugian disebabkan oleh kebakaran tidak sengaja (kebakaran sepontan) atau kebakaran dengan sengaja, perayu yang dijamin dan mestilah dilindungi semenjak andaian terhadap jenayah yang berlaku di dalam pihaknya (lihat perenggan 14).

(3) Standard pembuktian yang diperlukan di mana terdapatnya dakwaan fraud di dalam prosiding sivil mestilah melangkaui batas keraguan dan bukannya imbangan kebarangkalian; *Yong Tim v Hoo Kok Chong & Anor* [2005] 3 CLJ 229 diikuti. Oleh itu, ianya agak membingungkan bagi pihak Mahkamah Rayuan untuk sampai kapada dapatan bahawa adanya bukti mengikut keadaan memuaskan hati kedua-dua standard, seperti imbangan keberangkalian dan melangkaui batas keraguan. Sudah tentu pendirian yang diambil oleh Mahkamah Rayuan adalah mengejutkan, bukan saja membayangkan penyimpangan daripada duluan terkini Mahkamah Persekutuan yang mengikat tetapi berkemungkinan juga kurangnya kesedaran kepada standard pembuktian yang diperlukan di dalam prosiding sivil yang menumpukan kepada perlakuan jenayah (lihat peranggan 16).

(4) Agak jelas, keterangan PW8 dan DW11 bertentangan dengan keterangan DW10 dan DW37 berkenaan dengan masa kebakaran. Berhadapan dengan dua percanggahan yang serius dan dengan dua kemungkinan, hakim-hakim Mahkamah Rayuan yang bijaksana seharusnya menolak keterangan DW10 dan DW37 seperti mana hakim bicara yang bijaksana lakukan, adalah diingatkan bahawa kedua-dua saksi telah mengaku bahawa mereka telah menipu dan adalah mudah untuk berkata bohong dan oleh itu keterangan mereka mengandungi pengakuan bohong, setiap seorang telah melakukan

empat ke lima pernyataan yang berbeza ke atas situasi yang berbeza. Keterangan DW10 dan DW37 adalah tidak bermakna, tidak terdapatnya bukti atau apa jua untuk mengesahkan kebakaran sengaja seperti mana yang didakwa oleh responden. Dalam kes sedemikian, Mahkamah Rayuan mestilah mengikut pandangan hakim bicara yang bijaksana yang mana melihat dan mendengar saksi-saksi. DW10 dan DW37 adalah diputuskan sebagai saksi yang tidak boleh dipercayai dan keterangan mereka telah dicabar oleh mahkamah bicara. Oleh yang demikian, adalah tidak betul untuk Mahkamah Rayuan untuk berpegang berdasarkan keterangan mereka bahawa kebakaran dengan sengaja telah dibuktikan melangkaui batas keraguan (lihat perenggan 18).

(5) Responden tidak mengemukakan mana-mana keterangan yang boleh dipercayai dan meyakinkan yang secara jelas menunjukkan skop, lingkungan dan takat kuasa yang diberikan kepada Balasingham. Dengan ketiadaan keterangan tersebut, tindakan salah Balasingham tidak boleh diambil dalam pertimbangan untuk menganggap tanggungan perundangan kepada perayu terutama kesalahan jenayah. Ianya adalah tidak terfikir untuk mencadangkan bahawa pemegang saham ASPM daripada pelbagai negara Asean, India dan England telah bersubahat dengan Balasingham untuk membakar gudang. Oleh itu dengan ketiadaan kuasa untuk bertindak, mahkamah ini gagal untuk melihat bagaimana Mahkamah Rayuan boleh sampai kepada kesimpulan bahawa Balasingham telah pada masa yang material bertindak bagi pihak perayu. Oleh yang demikian, Balasingham tidak boleh bertindak bagi pihak perayu di dalam syarat 13 polisi. Ianya diikuti, oleh itu dalam ketiadaan bukti pengurusan dan kawalan yang mutlak perayu oleh Balasingham (dan tidak terdapatnya bukti tersebut dalam kes ini), tindakan Balasingham tidak boleh menjadi tindakan perayu. Olh yang demikian, perayu tidak boleh dihalang daripada menuntut jumlah yang diinsurankan (lihat perenggan 20–21 & 25).

(6) Mahkamah ini bersetuju dengan dapatan hakim bicara yang bijaksana bahawa responden telah gagal untuk membuktikan fraud terhadap perayu melangkaui batas keraguan. Walaupun responden berjaya dalam mendatangkan syak di dalam punca kebakaran secara sengaja. Syak walaupun hebat, adalah tidak mencukupi untuk membuktikan fraud yang mana perlu dibuktikan melangkaui batas keraguan. Dalam kes ini, responden, sebagai syarikat insuran, tidak melepaskan beban pembuktian atas dakwaan fraud dan perayu sebagai pihak yang diinsurankan, oleh itu mesti berjaya (lihat perenggan 27).]

Notes

For a case on expert evidence, principles applicable, see 7(1) *Mallal's Digest* (4th Ed, 2006 Reissue) para 1486.

For a case on findings of fact of trial judge, see 7(1) *Mallal's Digest* (4th Ed, 2006 Reissue) para 830.

For cases on appeal, interference by appellate court, see 2(1) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 946–964.

For cases on fire insurance, claim on policy, see 8(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 96–100.

For cases on fire insurance, fraudulent claim, see 8(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 113–115.

For cases on fraud, standard of proof in civil action, see 2(1) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 2507–2508.

Cases referred to

Bramblevale Ltd, Re [1970] Ch 128 (refd)
Erlin-lawler Enterprises Inc v Fire Insurance Exchange (1968) 267 Cal App 2 (refd)
Gotham Construction Co. v Amulya Krishna AIR 1968 Calcutta 91 (refd)
Kooragang Investment Pty Ltd v Richardson & Wrench Ltd [1982] AC 462; [1981] 3 All ER 65; [1981] 3 WLR 493 (refd)
Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin [2003] 2 MLJ 97 (refd)
Mst Chameli Debi v Purusattam Singh AIR 1974 Calcutta 316 (refd)
Rejab bin Lebai Man & Anor v Public Prosecutor [2001] 4 MLJ 106 (refd)
Rothstein v Sentinel Fire Ins. Co. [1936] 1 DLR. 310 (refd)
United Africa Company Ltd v Saka Owoada [1955] AC 130 (refd)
Yong Tim v Hoo Kok Chong & Anor [2005] 3 CLJ 229 (folld)

Appeal from: Civil Appeal No A02–338 of 2000 (Court of Appeal, Putrajaya)

Christopher Fernando (CK Leong, VS Viswanathan, SH Leong, Suppiah, Stanislaus, Mahendran and Marisa Regina with him) (CK Leong & Co) for the appellant.
Porres Royan (C Vijayakumar, Anad Krishnan, T Sudhar and SM Chua with him) (Shook Lin & Bok) for the respondent.
T Sagadaven (Persatuan Insuran Am Malaysia) and Wong Chong Wah and Khoon Loon (Bank Negara Malaysia) watching brief.

Nik Hashim FCJ (delivering judgment of the court):

THE QUESTIONS

[1] On 18 April 2006, this court granted leave to appeal on the following questions:

(i) whether it is opened to an appellate court to totally disregard (in the sense of not adverting at all to) the evidence and findings of two experts one of whom was a Senior Government Chemist and Director of the Chemistry Department, Perak, Amar Singh (PW9) and the other a respected retired Professor of Chemistry at the University Malaya, Professor Dato' (Dr) Chan Kai Cheong (PW11) who both conducted investigations and tests of the site on the issue of arson, which issue is the most crucial in these proceedings and that significantly their evidence and findings had cast serious doubts that the fire was a result of arson and that it could have been caused by 'spontaneous combustion' and whether it is competent for the Court of Appeal to rely more on the so called circumstantial evidence as opposed to the direct and scientific evidence in reversing a decision of a trial court;

(ii) whether it is competent for the Court of Appeal to hold that the acts of a single shareholder/Director binds the company when the shareholder/Director was not acting in the course of his employment.

BACKGROUND

[2] The appellant known as Asean Security Paper Mills Sdn Bhd ('ASPM'), is a joint venture project approved by the Asean Economic Ministers and includes shareholders from Asean member countries, namely Philippines, Singapore, Thailand, Brunei and Malaysia and other non-Asean countries like India and United Kingdom. (see PW1, pp 560–561 record of appeal jil 3). ASPM at all material times was involved in the purchase and sale of various categories of papers including security paper. Pursuant to its business activities, it stored its goods initially at a KTM warehouse in Kuala Lumpur, and later at a warehouse in Kg Acheh, Sitiawan.

[3] On 23 July 1989, the appellant obtained a fire insurance cover from the respondent, who were co-insurers, for a sum of RM14.932m in respect of the goods stored at its warehouse. Later on 29 August 1989, the sum insured was increased to RM32.431 million with effect from 30 August 1989.

[4] On 11 September 1989, a fire occurred at the warehouse in Kg Acheh, Sitiawan resulting in the loss of all the stocks of a variety of papers stored in the warehouse. Apart from the stocks being burnt, the warehouse and a forklift were also burnt. The appellant made a claim against the respondent for a sum of RM16,124,500 pursuant to the policy. The respondent refused to pay on the ground that the claim was fraudulent under condition 13 of the policy, the material part of which reads:

> If the claim be in any respect fraudulent, or if any false declaration be made or used in support thereof, or if any fraudulent means or devices are used by the insured or any one acting on his behalf to obtain any benefit under this policy; or, if the loss or damage be occasioned by the wilful act, or with the connivance of the insured …. all benefit under this policy shall be forfeited.

On the respondent's refusal to pay, the appellant commenced a suit against them. The respondent's defence was that the claim was fraudulent on the ground that the fire was a result of deliberate acts of arson. After a trial at which viva voce evidence was taken, the High Court found for the appellant. The Court of Appeal however disagreed with the High Court, reversed the judgment of the latter and dismissed the appellant's suit with costs (see [2006] 3 MLJ 1).

[5] Before directing our minds to the two questions, it is pertinent that we set out briefly the relevant findings of the High Court in giving judgment for the appellant and the reasons for the reversal of the judgment by the Court of Appeal.

HIGH COURT

[6] This is what the learned High Court judge said of the appellant's case:

A The plaintiff's (appellant's) case is that the fire occurred due to 'spontaneous combustion', natural, or other causes, but not deliberate. In regard to the investigation in the cause of the fire, the plaintiff called PW9 and PW11 to give their evidence in court. The plaintiff's witness Amar Singh (PW9) was the Senior Chemist and Director of Chemistry Department, Perak and has had 30 years of experience as a government chemist, and has given evidence as an expert witness on numerous occasion in court where his evidence has B always been accepted. His report arising out of his investigation into the cause of the fire at the plaintiff's warehouse in Kg Acheh, Sitiawan was produced and marked as P12 …

In the course of his investigation into the cause of the fire, PW9 stated that he did not find any traces of chemicals or hydrocarbon, and could not determine how the fire started. He was informed that security paper was stored in the warehouse prior to the fire, and since C security paper had special additional chemicals, it could be prone to 'spontaneous combustion'. He explained that certain chemicals react at certain temperature and humidity. This would trigger a fire without outside interference. However in this case, he could not say if 'spontaneous combustion' took place, but nevertheless he could not discount it as the cause of the fire …

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Lastly, PW9 stated that since the roof of the warehouse was metallic, the heat caused by the fire would have been reflected by the metal roofing, and if the heat was sufficiently hot and intense, it could start new fire …

Professor Chan (PW11) had a series of academic degrees relating to Chemistry. He was also E a Fellow of Royal College of Chemistry London, and a Registered Chemist with the Malaysian Institute of Chemistry. He was a Professor of Chemistry at the University of Malaya from 1972 till 1988. After he retired, he joined a firm of consulting chemists … PW11 testified that he went to the plaintiff's premises in Sitiawan with a colleague Mr Yeoh on 16 September 1989 at about 11 am. He spent about 3½ hours at the site and a further few hours with the staff. He took eight samples at the site. In the course of his investigation, F he could not find any hydrocarbon from the samples taken. He was unable to determine the cause of the fire, and stated in his report that 'spontaneous combustion' could not be ruled out.

He stated that all combustible material had a temperature at which it catches fire by itself G without any outside assistance. That temperature was called 'kindling temperature'. If a chemical compound comes to heat with oxygen in the atmosphere, and with the right amount of moisture comes into contact in the air, it would generate a lot of heat. When the temperature reached a 'kindling point', the substance would burn with flames. This is what he called 'spontaneous combustion'. PW11 stated that he had read of a case where 'spontaneous combustion' had taken place in the case of a newspaper. In this case, witness H stated that 'spontaneous combustion' could have happened …

In his view, the act of 'spontaneous combustion' could have burned the entire stock of paper in the warehouse …

I The defendant (respondent) called four witnesses DW20, DW21, DW25 and DW30 with respect to issues including the investigation of the fire, and the fire itself …

Robert Collin Ranshaw (DW20) is a retired chemist … He was doubtful if 'spontaneous combustion' could occur in the case of security paper, but there was a remote possibility it could have taken place. Walter Starn (DW21), a chemist and Professor of Chemistry at the

University of Sydney, stated that 'spontaneous combustion' of security paper could not happen. David A Robbins (DW25), a consultant scientist … added that if certain chemicals react with another chemical, 'spontaneous combustion' could not be ruled out. Barry Dhillon (DW30) stated in evidence that he has been a fire investigator for 17 years … He stated that the paper in the warehouse could not have caught fire as a result of 'spontaneous combustion', and in his view the fire started at least 12 hours before it was reported …

Siow Kwen Sia (DW34) a forensic document analyst … This witness admitted that if the paper was contaminated with dry oil, then it would spontaneously combust … and this could happen to security paper as well …

[7] On the evidence of the experts, the learned judge said at pp 223 and 224 of the appeal record:

It is abundantly clear that none of the witnesses termed as experts by the defense mentioned above, inspected the site of the fire. No one ever examined the security paper kept at the warehouse, and none knew about the chemicals used in the production of the security paper. All admitted that it was crucial to visit the site. Their evidence was based among others, on photographs taken of the contents of the warehouse prior to the fire, and photographs of the site after the fire.

The totality of evidence adduced by the defence on this issue is based on guesswork, assumptions and vague evidence. This type of evidence should be viewed with caution. I have no hesitation to conclude that the evidence of DW20, DW21, DW25, DW30 and DW34 is wholly unacceptable for reasons given earlier. I would be doing a grave injustice if I were to accept their evidence, as it is not based on primary facts and personal knowledge, but on conjecture without any proper foundation.

On the other hand, the evidence given by Amar Singh (PW9) and Prof Chan Kai Cheong (PW11) was straight forward, having had the advantage of examining the site and doing certain tests. Having reviewed and considered the evidence of both PW9 and PW11 vis a vis the evidence of DW20, DW21, DW25, DW30 and DW34, I have no hesitation in accepting the evidence of PW9 and PW11 to the evidence of DW20, DW21, DW25, DW30 and DW34 whose conclusion are based not on primary evidence, but on conjecture and without proper foundation.

[8] On the respondent's contention that the fire was deliberately started by DW10 and DW37, the learned judge ruled at p 231:

Since the evidence of DW10 and DW37 have been held to be impeached, I attach no weight to their evidence and hold them to be totally unreliable.

[9] At the end of the judgment, the learned judge concluded at p 253:

Having heard all the evidence adduced at the trial, it is my view that although the defendant may have shown a degree of suspicion, that in my view is insufficient for me to conclude that fraud has been established beyond reasonable doubt. Therefore, on the totality of evidence before me, I am satisfied that the plaintiff has proved its case on a balance of probabilities. In the circumstances, I enter judgment for the plaintiff for the sum of

RM16,124,500 with interest at 8% from the date of filing the writ and thereafter at 8% to the date of satisfaction …. costs to the plaintiff.

COURT OF APPEAL

[10] The Court of Appeal allowed the appeal with costs. Gopal Sri Ram JCA, delivering the judgment of the court, listed 14 grounds to support the respondent's charge of fraud by the appellant in that the warehouse was set on fire by DW10 and DW37 on the instructions of Balasingham, and the grounds are:

(1) There are the circumstances the increase in the value of the insured goods. Prior to 23 July 1989, the respondent (appellant) had obtained cover from an insurance company called UPI for a sum of RM2.5m. Then with effect from 23 July 1989, the respondent (appellant) obtained cover for RM14.932 with Provincial and the appellant (respondent). A week later, on 30 July 1989 the amount of the insured value was suddenly increased from RM14m to RM32m. What made the goods become so valuable within a period of about a week.

(2) When the policy of insurance was being negotiated, Balasingham insisted upon the inclusion of a spontaneous combustion clause for which extra premium had to be paid. He also insisted upon a condition that in the event of a loss, the adjusters must be appointed with the consent of the respondent (appellant) and its brokers. PW3 described this as an extra ordinary condition. This evidence is unchallenged. There is absent any explanation from the respondent (appellant) as to why Balasingam insisted in these two matters.

(3) It is the respondent's (appellant's) case that the paper in question was security paper, a very valuable and expensive commodity. It is reasonable to expect the owner of such a commodity to provide tight security for it during its transportation. Yet, we find that no security was arranged when the paper was transported from Brickfields to the warehouse at Kampong Acheh, Sitiawan. The question that arises is this: Was the paper really as valuable as claimed by the respondent (appellant)?

(4) This supposedly very valuable paper — worth RM32m, was stored in a wooden warehouse with a zinc roof. In this circumstances, it is not reasonable for the owner of such valuable property to have placed it within a better and stronger structure or premises.

(5) The security for the warehouse — considering that it housed goods worth RM32m — consisted of only DW31 who was on duty only from 7pm to 7am. If the paper was truly worth RM32m, would it not be reasonable to expect the respondent (appellant) to provide more guards to take care of it during the hours that the office was closed?

(6) According to the evidence of DW5 and DW23, Balasingham briefed his employees to call him and no one else in the event of a fire. One would have thought that the first people that needed to be called were the Fire Brigade.

(7) There is evidence that paper was being scattered in the warehouse in the presence of Balasingham on the day before the fire. The evidence of DW31, the guard, on this point was not challenged and his evidence was never considered.

The question that naturally arises is: why scatter paper all over the warehouse, especially paper that was worth RM32m? A

(8) The warehouse had burned down at between 7am and 8am on the morning of 11 September 1989, according to the evidence of DW1, DW2 and DW3. Then, why did Balasingham want the time of the fire to be stated in D17 as 4pm? B

(9) On 11 September 1989 at about 2pm, Balasingham calls on DW11 at the latter's office in Sitiawan and asks him about the procedure to be followed in the event of fire. By this time, the warehouse had already burned down. The evidence of the independent eyewitnesses DW1, DW2 and DW3 confirms this. There is no explanation from the respondent (appellant) as to why the inquiry was made of DW11. C

(10) On the same day, ie 11 September 1989 at 4.30pm Balasingham instructs DW23 to report the fire to the Fire Brigade Station at Sitiawan. DW11 confirms that at the time stated he received an alarm about the fire at the respondent's (appellant's) warehouse. He despatches fire engines there to deal with the fire. On arrival, he finds that the building had collapsed. He estimates the time of fire at 2pm but agrees in evidence that it could have been earlier. D

(11) DW11 prepares exh D16 (the Fire Report) dated 12 September 1989. PW10 who is stationed at the Fire Brigade Headquarters in Ipoh is approached by Balasingham and at his request amends D16 by deleting (i) the time of the fire from 2 pm to 4 pm and (ii) the description of the scene when the Fire Brigade arrived. There is no explanation from the respondent (appellant) as to why this was done. E

(12) An excavator is brought onto the site to transfer the evidence of the fire. On 12 September 1989, DW9, an employee of the respondent (appellant) is instructed by Balasingham to get an excavator to stir up the ash to make sure that the papers were burnt. DW9 stops a passing excavator driven by DW12 and has the job done. This witness, DW9, finds a cigarette lighter at the scene and hands it to Balasingham. It is put to DW9 under cross-examination that he had asked for RM10,000 from Balasingham failing which he would lie against the latter. The witness denied this. But Balasingham was not called to say that such a demand had been made or that an excavator had never been called for. F G

(13) There is the fact that statutory declarations were obtained from several of the respondent's (appellant's) employees in anticipation of litigation. No explanation was given by the respondent (appellant) for having adopted this unusual course of action. H

(14) There is evidence at the respondent's (appellant's) impecuniousity. Although the respondent's (appellant's) paid up capital was supposed to be RM60 to RM70m, it had no assets and was insolvent to the point that it was wound up by the court. There is evidence on record that the respondent (appellant) was unable to pay even a debt of RM1 million. The statement of affairs (exh D37) filed by the respondent's (appellant's) liquidator shows that its only asset was the contingent claim against the appellant (respondent) and I

provincial. The impecuniousity of the respondent (appellant) at the material time is a relevant fact under s 8 of the Evidence Act 1950. It is strong evidence of motive.

At p 121, the court ruled:

> When gathered together and considered as a whole, the circumstances set out above establish beyond a reasonable doubt that the fire was the result of an act of arson. There is no doubt in our minds that this is a case where the warehouse was intentionally set fire to by DW10 and DW37 acting on the instructions of Balasingham and that this was not a case of spontaneous combustion as alleged by the respondent (appellant). There is also no doubt in our minds that on the evidence considered as a whole it was Balasingham who planned the fire and its execution and that it was his intention to cause the respondent (appellant) to make a false and fraudulent claim against the appellant (respondent).

[11] On the question of whether the appellant was bound by Balasingham's acts in the destruction of the warehouse, the Court of Appeal cited 10 items of facts to support its conclusion that the appellant was bound by Balasingham's acts, and they are:

(i) At all material times, Balasingham was a substantial shareholder of the respondent (appellant). He held shares indirectly through another company in which he held a substantial financial interest. The annual report of the respondent (appellant) confirms this to be the case.

(ii) The annual report carries a message from His Royal Highness the Sultan of Perak which describes Balasingam as the driving force of the respondent's (appellant's) project.

(iii) Balasingham attended the meeting held on 29 July 1989 at which the insurance policy was negotiated.

(iv) He took an active part in the events following the fire, such as calling on PW10 and DW11. In particular, he got the time of the fire and the state of the building changed as reflected in D17. This was specifically to help the respondent (appellant).

(v) He took an active part in matters relating to the claim under the policy. For example, he stopped the adjusters from coming onto the site.

(vi) He took an active part in the preparation of the stock book and having the entries in it verified by the appellant (respondent) and the adjusters.

(vii) He attended a meeting held at the appellant's (respondent's) premises after the fire in order to submit the claim under the policy.

(viii) There was neither any contemporaneous nor subsequent disavowal by the respondent (appellant) of Balasingham's right to represent it.

(ix) There is the evidence of at least one witness, DW5, that he regards Balasingham and the respondent (appellant) as one and the same person.

(x) There is evidence on record showing that he was instrumental in obtaining statutory declarations favourable to the respondent's (appellant's) claim from several employees of the appellant (respondent). These statutory declarations

were later used at the trial to cross-examine the appellant's (respondent's) witnesses for the purpose of discrediting them.

APPEAL TO THIS COURT

First question

[12] On the first question, learned counsel for the appellant submitted that the learned judges of the Court of Appeal erred in totally disregarding the evidence of the experts as to the cause of the fire, thereby occasioning a grave miscarriage of justice. They ought to have evaluated the evidence of the experts just as they had evaluated the evidence of the alleged arsonists DW10 and DW37. By so disregarding the evidence of the experts, the reasoning of the Court of Appeal has left the erroneous impression that DW10 and DW37 were the only witnesses who gave evidence as to the cause of the fire when these two witnesses were self-confessed liars. Learned counsel further submitted that the learned judges of the Court of Appeal ought to have attached sufficient weight to the finding of the learned trial judge that the fire was not caused by arson bearing in mind the learned trial judge had the audio visual advantage of the witnesses and experts which the learned judges of the Court of Appeal were deprived of.

[13] With respect, we agree with the appellant. Clearly in the instant case, the Court of Appeal has totally disregarded the evidence of the experts namely PW9 and PW11 which focused on scientific evidence as to the causes of the fire that had occurred. Scientific evidence is undoubtedly important to establish whether the appellant has deliberately committed arson or not. Similarly, the experts' opinion is essential to explain and understand whether a particular type of paper could have triggered spontaneous combustion or not. Despite having such detailed evidence from as many as seven experts (PW9, PW11, DW20, DW21, DW25 and DW30, DW34) representing both the appellant and the respondent of whom PW9, PW11, DW20, DW25 and DW34 testified to the effect that 'spontaneous combustion' could not be ruled out, yet the Court of Appeal has ignored and disregarded the most material expert evidence available on record. Non-consideration of material evidence constitutes 'insufficient judicial appreciation of relevant evidence' which phrase was lucidly explained by the Court of Appeal in *Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin* [2003] 2 MLJ 97 with which we agree. Thus, the failure of the Court of Appeal to have regard to the experts' evidence in arriving at its decision has indeed resulted in a serious and substantial miscarriage of justice which invites appellate interference. As Sinha J said in *Mst Chameli Debi v Purusattam Singh* AIR 1974 Calcutta 316 at p 318:

> It is well established that failure to consider important evidence or important surrounding circumstances would constitute an error of law and it would be open to this court in that situation to interfere in second appeal.

And see also in *Gotham Construction Co v Amulya Krishna,* AIR 1968 Calcutta 91 where B Mukherji J said at p 99:

> That failure to consider material evidence does make an error of law is beyond argument.

[14] The respondent charged that arson on instigation by Balasingham was the cause of the fire and thus it was incumbent for the respondent to prove circumstances which excluded any other explanation. In this case, however, the respondent had failed to do so. It must be noted that even the respondent's own witnesses (DW20, DW25 and DW34) admitted that 'spontaneous combustion' could not be ruled out. So, where the evidence leaves it open whether the loss was caused by accidental fire (spontaneous combustion) or arson, the appellant being the assured must recover since the presumption against crime operates in its favour. In *Rothstein v Sentinel Fire Ins Co* [1936] 1 DLR 310, the Quebec Superior Court opined that:

> where the defence of arson is set up in an action to recover loss under a fire insurance policy, …. (the) defendant must prove circumstances which exclude any other explanation and in the absence of clear, concordant and preponderant presumptions that plaintiff was guilty of the offence, plaintiff should be granted the benefit of the doubt.

[15] On the question of onus of proof, the court quoting Wedford and Otter-Harry's work on *Fire Insurance* (3rd Ed) p 256 reasoned thus:

> If the property is actually burned, the loss is in fact caused by fire and the policy therefore covers it unless the insurers succeed in establishing that the fire was originated by an excepted cause. *Where the result of the evidence is to leave the cause of the fire in doubt, the insurers have not discharged the onus of proof and the assured therefore will succeed. Further, if the insurers rely on the defence of arson by or with the privity of the assured, the charge, being in effect a criminal charge, must be strictly proved. Hence, where the evidence leaves it open whether the loss was caused by accidental fire or by arson, the assured must recover since the presumption against crime operates in his favour* (emphasis added).

[16] It is now settled law that the standard of proof required where there is an allegation of fraud in a civil proceedings must be one of beyond reasonable doubt and not on balance of probabilities (see *Yong Tim v Hoo Kok Chong & Anor* [2005] 3 CLJ 229 (FC)). Thus, it is rather perplexed on the part of Court of Appeal to come to a finding that the available circumstantial evidence satisfies both the standards like balance of probabilities and beyond reasonable doubt. Indeed, the stance taken by the Court of Appeal is surprising, not only reflects a departure from the Federal Court's latest binding precedent but perhaps also a lack of appreciation as to the required standard of proof in a civil proceedings focusing on criminal conduct.

[17] The claim by the Court of Appeal that the chain of circumstantial evidence proves beyond reasonable doubt the alleged commission of arson is legally untenable. Particularly so when the respondent has adduced evidence which contradict its own evidence as to the key element as to the occurrence of the fire at a particular point of time on 11 September 1989. Both DW10 and DW37 claimed that they were responsible for committing arson after 1am on 11 September 1989, early hours on Monday. The respondent also produced Abu Yazid bin Siron (DW11) of the Fire Brigade who testified that the fire started at 4.30pm or earlier at about 2pm And his evidence was corroborated by Lau Yau Thin (PW8) who testified at p 585 of the record:

> I met him (Balasingham) next day (11 September 1989) at about 4 pm at the warehouse in Sitiawan. I did not enter the compound because the warehouse was on fire.

[18] Unfortunately, the Court of Appeal did not consider PW8's evidence. Quite clearly, PW8's and DW11's evidence contrast with the evidence of DW10 and DW37 with regards to the time of the fire. Faced with these two serious contradictions and with two possibilities, the learned judges of the Court of Appeal ought to have rejected the evidence of DW10 and DW37 as the learned trial judge had done bearing in mind that both these witnesses had admitted that they had lied and were prone to telling lies and that their evidence contained admission of lies, each having made four to five different statements on different occasions. Devoid of DW10's and DW37's evidence, there was no evidence whatsoever to substantiate arson as alleged by the respondent. In such a case as this, the Court of Appeal must defer to the views of the learned trial judge who had seen and heard the witnesses. DW10 and DW37 were held to be unreliable witnesses and their evidence had been impeached by the trial court. Therefore, it is not right for the Court of Appeal to hold based on their evidence that arson was proved beyond a reasonable doubt. In *Re Bramblevale Ltd* [1970] Ch 128, Lord Denning MR reminded at p 137E–F:

> Where there are two equally consistent possibilities open to the Court, it is not right to hold that the offence is proved beyond reasonable doubt.

Second Question

[19] On the second question, we agree with the appellant that the learned judges of the Court of Appeal were erroneous in holding that the appellant, which is a company, was bound by Balasingham's acts.

[20] The liability of a company for any wrongful act committed by a servant depends on whether the wrongful act was committed in the course of employment. The question as to whether he was acting in the course of employment or not depends on the facts of each case (see*United Africa Company Ltd v Saka Owoada* [1955] AC 130 (PC)). In the present case, the respondent has not adduced any reliable and cogent evidence which clearly indicates the scope, ambit and the extent of the authority conferred on Balasingham. In the absence of such evidence, the wrongful acts of Balasingham cannot be taken into consideration for attributing legal liability to the appellant, especially so in a criminal offence. It is unthinkable to suggest that the shareholders of ASPM from the various Asean countries, India and England had connived with Balasingham to burn the warehouse. Thus, in the absence of authority to act, we fail to see how the Court of Appeal could come to the conclusion that Balasingham was at all material times acting on the appellant's behalf. In *Kooragang Investment Pty Ltd v Richardson & Wrench Ltd* [1982] AC 462; [1981] 3 All ER 65; [1981] 3 WLR 493, the Judicial Committee of the Privy Council ruled:

In determining whether an act done by a servant or agent was done in the course or within the scope of his employment in cases where there was no dealing by the injured third party with the servant or agent and where the issue was one not of ostensible authority but of actual authority or total absence of authority, it was necessary in order to render the master liable to prove that he had authorized the act, and authority could not be inferred from the fact that the acts done were of a class which the servant or agent was authorized to do on the master's behalf — *Uxbridge Permanent Benefit Building Society v Pickard* [1939] 2 All ER 344 distinguished. On the facts it was clear that R had had no authority to make the valuations in question and in making them he had acted totally outside the course and scope of his employment. He had made them not as an employee of the respondents but as an employee or associate of the GB Group and on their instructions. It followed therefore that the respondents were not liable to the appellants for R's negligence, and the appeal would accordingly be dismissed.

[21] Balasingham could not be acting on the appellant's behalf within condition 13 of the policy. The recital of ten items of facts referred to by the Court of Appeal demonstrates that these facts were either incorrect or were wrong inferences drawn. For example item (ix) where the Court of Appeal recited:

(ix) There is the evidence of at least one witness, DW5, that he regards Balasingham and the respondent (appellant) as one and the same person.

[22] A perusal of DW5's evidence at p 675 of the record does not support the inference made by the Court of Appeal that Balasingham and the appellant was one and the same person. In fact, DW5 testified:

When I joined the company the person I reported to one Mr Balasingham — identified. He was the head of the company. He was a director of the company. I am not sure if he was Chairman of the company.

[23] This shows that the Court of Appeal has chosen to rely upon the statement which was never deposed to and recorded by the trial judge. We will go further and say that the Court of Appeal deems it necessary to invent a version unsubstantiated by any evidence. This is deplorable to say the least.

[24] The Court of Appeal also observed at item (viii) that, '*there was neither any contemporaneous nor subsequent disavowal by the respondent (appellant) of Balasingham's right to represent it*'. Again we agree with the appellant. The observation is not legally sustainable simply because it is not for the appellant to do so; it is for the respondent to be aware and cautious whether the person concerned has the required authority to represent it or not. In the instant case, there is nothing on record to show that Balasingham has been given such power or authority by the appellant.

[25] Balasingham was only a minor shareholder holding a mere 5.28% of the shares of the appellant company. The Court of Appeal relied on the annual report to

support that Balasingham was holding a substantial financial interest in the appellant. But the annual report was not properly proved and produced in court (see *Rejab bin Lebai Man & Anor v Public Prosecutor* [2001] 4 MLJ 106) and thus, there was no evidence before the court to support such a claim. Consequently, the court can only rely on PW1's evidence as to Balasingham's holding in the appellant. According to PW1, (p 561 of the record) Balasingham held only 5.28% of the court observed: the shares in the appellant and as such, the holding cannot be construed as substantial in nature. So also the remark made by His Royal Highness the Sultan of Perak at item (ii) describing Balasingham as the driving force of the appellant's project. This kind of evidence cannot be equated as Balasingham having substantial financial interest in the appellant and therefore represents the appellant. It follows therefore that in the absence of evidence of absolute management and control of the appellant by Balasingham (and there was none of such evidence in this case), the acts of Balasingham cannot become the acts of the appellant. Consequently, the appellant cannot be barred from claiming the sum insured. In *Erlin-lawler Enterprises Inc v Fire Insurance Exchange* [1968] 267 Cal App 2:

> When the beneficial owner of practically all of the stock in a corporation who has the absolute management and control of its affairs and property sets fire to the property of the corporation, or causes it to be done, the corporation should not be allowed to recover on a policy for the destruction of the corporate property by a fire so occasioned, and, if an officer or shareholder has absolute control in the conduct of the business of a corporation, his acts on behalf of the corporation become the acts of the corporation barring it from recovery even though he is not the dominant shareholder.

[26] In the instant case, the learned trial judge had examined carefully all the evidence adduced including that of the experts' and came to a correct judgment. In the light of the clear statement by the learned trial judge that he chose to accept the evidence of the appellant to the evidence of the respondent, we find that the reversal of the judgment by the Court of Appeal is wholly unjustified.

[27] Further, we agree with the finding of the learned trial judge that the respondent had failed to prove fraud against the appellant beyond reasonable doubt. At most the respondent succeeded in creating a suspicion in the cause of the fire by arson. Suspicion, however great, is insufficient to prove fraud which needs to be proved beyond any reasonable doubt. In this case, the respondent, being the insurer, has not discharged the onus of proof of the charged fraud and the appellant, being the assured, therefore must succeed.

[28] Thus, for the above reasons, we would answer the two questions in the negative, ie in favour of the appellant. Accordingly, the appeal is allowed with costs here and in the courts below and the deposit be refunded to the appellant. We set aside the orders of the Court of Appeal and order that the orders of the High Court be restored.

[29] The learned CJ (Sabah and Sarawak) and my learned brother, Hashim Yusoff FCJ had read this judgment in draft and had expressed their agreement with it.

Appeal allowed with costs.

Reported by Loo Lai Mee